



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2020-0487; FRL-8931-02-R3]

Air Plan Approval; West Virginia; 2020 Amendments to West Virginia's Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a state implementation plan (SIP) revision submitted by the State of West Virginia. This revision updates West Virginia's incorporation by reference of EPA's national ambient air quality standards (NAAQS) and the associated monitoring reference and equivalent methods. This action is being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before **[insert date 30 days after date of publication in the Federal Register]**.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R03-OAR-2020-0487. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov>, or please contact the person identified in the **For Further Information Contact** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Serena Nichols, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, PA 19103. The telephone number is (215) 814-2053. Ms.

Nichols can also be reached via electronic mail at Nichols.Serena@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On February 9, 2021 (86 FR 8727), EPA published a notice of proposed rulemaking (NPRM) for the State of West Virginia. In the NPRM, EPA proposed approval of a formal SIP revision submitted on June 5, 2020. This formal SIP revision updates West Virginia's incorporation by reference of EPA's NAAQS and the associated monitoring reference and equivalent methods.

II. Summary of SIP Revision and EPA Analysis

West Virginia Department of Environmental Protection (WVDEP) has historically chosen to incorporate by reference the Federal NAAQS, found at 40 CFR part 50, and the associated Federal ambient air monitoring reference methods and equivalent methods for these NAAQS found at 40 CFR part 53. When incorporating by reference these Federal regulations, WVDEP has specified that it is incorporating by reference these regulations as they existed on a certain date. The incorporation by reference of the NAAQS that is currently approved in the West Virginia SIP incorporates by reference 40 CFR parts 50 and 53 as they existed on June 1, 2018. West Virginia's June 5, 2020 SIP revision updates the State's incorporation by reference of the primary and secondary NAAQS and the ambient air monitoring reference and equivalent methods, found in 40 CFR parts 50 and 53, respectively, as of June 1, 2019. Since the last West Virginia incorporation by reference of June 1, 2018, EPA: 1) reviewed the primary NAAQS for sulfur oxides (SO_x), as required by CAA section 109(d), and retained the current 1-hour and annual sulfur dioxide (SO₂) NAAQS without revision; 2) designated one new equivalent method for measuring concentrations of ozone in the ambient air; 3) designated one new reference method for measuring concentrations of nitrogen dioxide in ambient air; and 4) designated one new reference method for measuring concentrations of carbon monoxide in ambient air. See 84

FR 9866 (March 18, 2019), 84 FR 11973 (March 29, 2019), 84 FR 50833 (September 26, 2019), and 84 FR 24508 (May 28, 2019).

The amendments to the legislative rule include changes to section 45-8-1 (General) and 45-8-3 (Adoption of Standards). The amendments update West Virginia's incorporation by reference of the primary and secondary NAAQS and the ambient air monitoring reference and equivalent methods from June 1, 2018 to June 1, 2019. West Virginia is incorporating the Federal rules in 40 CFR parts 50 and 53 as they existed on June 1, 2019 into 45-8-1 and 45-8-3. Other specific requirements and the rationale for EPA's proposed action are explained in the NPRM and will not be restated here.

III. EPA's Response to Comments Received

EPA received three comments on the February 9, 2021 NPRM. One comment was supportive of the State's revision while the other two stated that EPA should not approve this SIP revision and are therefore considered adverse comments. All comments received are in the docket for this rule. A summary of the two adverse comments and EPA's responses are provided herein.

Comment 1: One commenter claims that EPA should disapprove this SIP revision because these rules are already "in effect and full force." The commenter claims "EPA shouldn't have to keep approving West Virginia's rules into the SIP which incorporate the National Ambient Air Quality Standards. These West Virginia rules stem from the federal EPA's air standards and are already in force throughout the state, in fact they are in force throughout the entire nation regardless of what each individual state does."

Response 1: EPA does not agree that the SIP revision should be disapproved due to being "unnecessary." West Virginia law allows state agencies, such as WVDEP, to incorporate by reference federal regulations into the state regulations but does not allow those state agencies to "automatically" incorporate into the state regulations any updates to federal standards incorporated by reference. That is, if the federal regulation that was incorporated by reference

into the West Virginia regulations is changed, the state agency must then go through the state regulatory amendment process to ensure that the changes to the federal regulation are also adopted into the state regulations. Because EPA is required by the Clean Air Act to periodically review and revise, if necessary, the NAAQS and the regulations associated with the NAAQS, such as the ambient monitoring requirements, West Virginia must re-incorporate by reference the NAAQS into the state regulations every year to ensure that the NAAQS are up to date in the state law, so that they can implement their state air pollution control program. Following the update to the state regulations, the state must then submit to EPA a SIP revision incorporating the change to the state regulations into the SIP. This multi-step process to ensure the NAAQS applied in West Virginia are current with the federal NAAQS, and that the up-to-date NAAQS are approved into the West Virginia SIP, is the result of West Virginia law not providing for “automatic” update of state regulations when federal regulations that are incorporated by reference into the state regulations are changed.

Comment 2: The second comment from an anonymous party claims “EPA must disapprove West Virginia's rule for adopting the ambient air quality standards because of these limitations in state law and the requirements of the EPA's National Ambient Air Quality Standards.” This commenter also asserts that this rule conflicts with the NAAQS, claiming that “West Virginia's regulations would provide more information on how the state has met its ambient air quality standards by requiring that coal companies improve the air quality in their facilities. There is no requirement to provide information on how much improved air quality is required because the state does not have that information. West Virginia does not provide a summary of those improvements to other states and requires coal companies to report these improvements to West Virginia's Division of Environmental Management (DEM).” The commenter also argues that “The rule is also potentially inconsistent with the EPA's Environmental Justice Guidelines for addressing the health effects of air pollution, which says that air quality and climate change are two separate issues. This rule could limit states' ability to

consider this double jeopardy standard in their rules, making it more difficult for a state to comply with its air pollution law. West Virginia will have to obtain additional information and data from other states, which could require revisions to the rule, so that it may be consistent with the National Ambient Air Quality Standards. In the final rule, the state must prove that its proposed regulations are not inconsistent with the National Ambient Air Quality Standards because the federal standards are just as restrictive as the state's standards and because the other state's regulations do not serve the same purposes.”

Response 2: EPA disagrees that this plan should be disapproved due to alleged limitations in state law or potential inconsistencies with environmental justice guidelines or the NAAQS. The commenter’s intent is difficult to discern from the comment. The commenter’s initial argument does not cite which limitations in state law they are concerned about, making it difficult to ascertain how the NAAQS are at odds with that state law. To the extent that the comment is concerned about reporting requirements and/or the lack of reporting by coal producers, EPA is unaware of any conflicts these requirements present with the NAAQS. Regarding EPA’s environmental justice guidelines, the commenter again does not explain how this update to the NAAQS is inconsistent with the environmental justice guidelines, and without such an explanation EPA cannot assess this claim. Nevertheless, EPA does not believe that this plan has any inconsistency with the Agency’s environmental justice guidelines. Finally, commenter’s concern that this update to the NAAQS in West Virginia law could prevent the state from considering the “double jeopardy standard” in their rules is also unexplained. “Double jeopardy” is a concept whereby a person cannot be tried twice for the same criminal act, and the relevance of this concept to this particular revision to West Virginia’s SIP is not at all clear. Furthermore, this revision does not directly pertain to climate change but does adopt a change needed to ensure West Virginia can work toward ensuring attainment of the NAAQS. Therefore, EPA believes that this plan revision is consistent with the requirements of the Clean Air Act and therefore approvable.

IV. Final Action

EPA is approving the West Virginia SIP revision updating the date of incorporation by reference of EPA's NAAQS and the associated monitoring reference and equivalent methods.

V. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of 45CSR8, as effective on June 1, 2020. EPA has made, and will continue to make, these materials generally available through <https://www.regulations.gov> and at the EPA Region III Office (please contact the person identified in the **For Further Information Contact** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rule of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.¹

VI. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);

¹ 62 FR 27968 (May 22, 1997)

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take

effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[insert date 60 days after date of publication in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action.

This action, approving the West Virginia SIP revision incorporating by reference the NAAQS, may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Carbon monoxide, Sulfur dioxide, Lead, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: September 9, 2021

Diana Esher,
Acting Regional Administrator,
Region III.

For the reasons stated in the preamble, the EPA amends 40 CFR part 52 as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart XX—West Virginia

2. In § 52.2520, the table in paragraph (c) entitled “EPA-Approved Regulations in the West Virginia SIP” is amended by revising the entries for “Section 45-8-1”, “Section 45-8-2”, “Section 45-8-3” and “Section 45-8-4” under the heading “[45 CSR] Series 8 Ambient Air Quality Standards” to read as follows:

§ 52.2520 Identification of plan.

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(c) * * *

EPA-APPROVED REGULATIONS IN THE WEST VIRGINIA SIP

State citation [Chapter 16-20 or 45 CSR]	Title/subject	State effective date	EPA approval date	Additional explanation/ citation at 40 CFR 52.2565
* * * * *				
[45 CSR] Series 8 Ambient Air Quality Standards				
Section 45-8-1	General	6/1/20	<u>[Insert date of publication in the Federal Register, [Insert Federal Register citation]</u>	Docket #2020-0487. Filing and effective dates are revised.
Section 45-8-2	Definitions	6/1/20	<u>[Insert date of publication in the Federal Register, [Insert Federal Register citation]</u>	Docket #2020-0487. Previous Approval 2/25/20
Section 45-8-3	Adoption of Standards	6/1/20	<u>[Insert date of publication in the Federal Register, [Insert Federal Register citation]</u>	Docket #2020-0487. Effective date is revised.
Section 45-8-4	Inconsistency Between Rules	6/1/20	<u>[Insert date of publication in the Federal Register, [Insert Federal</u>	Docket #2020-0487. Previous

State citation [Chapter 16-20 or 45 CSR]	Title/subject	State effective date	EPA approval date	Additional explanation/ citation at 40 CFR 52.2565
			<u>Register citation]</u>	Approval 2/25/20
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